In the Queen's Bench.

APPEAL SIDE.

JOHN JOHNSON,

Appellant,

vs.

WILLIAM W. WILLIAMS,

Respondent.

RESPONDENT'S CASE.

PROVINCE OF CANADA.

LOWER CANADA.

In the Queen's Bench---Appeal Side.

IN APPEAL FROM THE DISTRICT OF ST. FRANCIS.

JOHN JOHNSON,
Defendant in the Court below,
Appellant,

against

WILLIAM W. WILLIAMS,
Plaintiff in the Court below,
Respondent.

RESPONDENT'S CASE.

This was an action in the Court below to revendicate a horse. The horse was seized. The Defendant was an innkeeper. The Plaintiff was in possession of the horse prior to and on the 10th of September, 1853. On last mentioned day he stopped at Defendant's inn in Barnston and ordered said horse to be put in his stable and cared for till he called for him. When he was ready to leave he demanded his horse, offering reasonable and customary tavern expenses of keeping, and defendant refused to deliver up the horse to him, whereon he instituted the action appealed from.

As explanatory of the pleadings and evidence it may be stated that one Lathrop Chamberlain owned the horse in question, called "Zack," in 1851-2, and Plaintiff acquired said horse of Chamberlain in 1853. Chamberlain boarded in 1851-2 at Cameron's tavern in Sherbrooke, and in June 1852 a bill was due for board and horse-keeping from him to Cameron, and he requested Cameron to hold said horse in his possession as a pledge till the debt was settled.

The defence set up to the action was that Defendant purchased the horse of one Oliver Cameron, who acquired it of said Lathrop Chamberlain. This defence is met by a special answer to the effect that Cameron never owned the horse and never sold him to Defendant. That the money paid by Defendant to Cameron was Chamberlain's money, and that Defendant only acted as Chamberlain's agent in paying Chamberlain's debt for board and lodging at Cameron's; that the horse was merely held by Cameron until his debt was paid, and was released to Chamberlain; that the Defendant had charged Chamberlain with this identical money, which in his plea to this action he pretends was the price of the said horse, in an account which had been settled by a suit wherein the disputed accounts between Chamberlain and Defendant had been determined; that said horse was never delivered to Defendant, and that Defendant's pretensions were fraudulent and in bad faith; and further, a special denial of the allegations of Defendant's plea.

Samuel Cleveland proves that Defendant stated that Plaintiff drove the horse to his stable and put him in, and that he had paid money for Chamberlain and got a bill of sale of the horse and he meant to keep him till he got a settlement with Chamberlain—proves horse to be valuable, damages £50.

Norman Cleveland values horse at not less than £75, proves Defendant's admission of taking the horse from Plaintiff same as former witness.

John Hackett worked for Plaintiff in summer and fall of 1853, knows Plaintiff to have possessed the horse as proprietor from July to 10th November, when it was detained from him; prove horse valuable, and badly used by Defendent since he has detained it, and greatly injured and damaged.

E. S. Southmayd heard Defendant say he had the horse in his stable and he would not let him go till he got his pay from Chamberlain, heard him order his ostler not to let Plaintiff have the horse.

Timothy Winn heard Defendant boast of having driven the horse and that he would do so, valuable horse, &c.

Oliver Cameron, the person from whom Defendant pleads that he purchased the horse, says: "I never claimed to own the horse, but had him in my possession until my claim was paid, by Mr Chamberlain's request." On being questioned as to the item in an account fyled by Johnson, Defendant in suit Johnson vs. Chamberlain, "Cash lent, del'd O. Cameron, $200," he says this is the only sum ever delivered by Defendant to him for Chamberlain.

John B. Shorey proves the tender of the money by Plaintiff for tavern expenses when he demanded his horse, and the refusal to give up the horse.

Henry Cameron, brother of Oliver Cameron, proves same facts as Oliver Cameron, also valuable horse, serious damage to Plaintiff, the detention, horse injured by Defendant, &c.

Defendant's Evidence.

Wright Chamberlain proves making of bill of sale in following terms:

June 25, 1852.

O. Cameron

Bo't of L. Chamberlain,

A small bay horse called "Zack," for One Hundred and Fifty Dollars.

Received Payment.

[(Signed,] L. Chamberlain.

Chamberlain also gives parol evidence of bargain between Defendant and Cameron for said horse.

The remainder of Defendant's evidence is principally respecting a proposed arbitration between Plaintiff and Defendant, which was not pleaded, and is totally irrelevant to the issue.

The judgment of the Court below was as follows:

"The Court having heard the parties by their respective Counsel, and examined the pleadings, proceedings and proof of record, and on the whole deliberated, considering that the Plaintiff hath proved the material allegations of his declaration, and namely that at and before the Defendant took possession of the horse, as and by this action claimed, he, the Plaintiff, had been in possession of the said horse, and had a legal right of property of the same, seeing that the Defendant hath failed to substantiate the allegations of his plea, and hath not in any legal way established that at the time that he the Defendant unlawfully took possession of the horse, nor since, he had any right of property or legal possession of the same; considering moreover, that illegal evidence hath been adduced in this cause, and namely that part of the Defendant's evidence mentioned in the Plaintiff's motion of this day for the rejection of such evidence, doth grant the said two motions, dismisses the Defendant's pleas, and adjudges the Plaintiff to be the lawful owner and proprietor of the said horse, and the seizure herein made to be good and valid, and doth adjudge and condemn the Defendant to restore and deliver up the said horse to the Plaintiff within fifteen days from the service of this Judgment on him the Defendant; and to pay to the Plaintiff five pounds for his damages, with costs of suit, distraction whereof is granted to J. S. Sanborn, Esquire, the Plaintiff's Attorney."

The Plaintiff in Court below was entitled to judgment, even if Defendant was the owner of the horse, on the maxim, *Spoliatus ante omnia restituendus*. Plaintiff, however, established all necessary proof of ownership of the horse, anterior possession as proprietor for more than four months. Defendant's case entirely failed. He established no right of property in the horse. Cameron never owned it and could not have transferred it. The evidence of Wright Chamberlain as to sale from Chamberlain to Cameron is contradicted by both Camerons, that although a bill of sale was made, the horse was merely held by Cameron as a pledge till his debt was paid, and was given up to Chamberlain upon the debt being paid. The evidence of Wright Chamberlain of sale from Cameron to Defendant, Johnson, was properly rejected by the Court as inadmissible, the alleged contract exceeding 100 livres, and the evidence upon another ground was properly rejected as not corroborated by any other evidence, *unus testis nullus testis*. Again, this alleged fact is contradicted by two witnesses, Oliver and Henry Cameron, and as a matter of credibility could have no weight. Supposing a bargain of sale completed, there was no delivery of the horse to Defendant. The sale would in that event be incomplete. Defendant from the summer of 1852 to November 1853, had made no assertion of his claim to the horse. The charge made by him in account with Lathrop Chamberlain, of the identical sum of $200 cash lent, delivered to Oliver Cameron, is conclusive, when compared with Cameron's evidence, against the Defendant. He charged the sum as cash lent and judgment was rendered in that suit, where the account between Johnson and Chamberlain was contested, and Defendant Johnson was found to be indebted to Chamberlain some £15, for which judgment was rendered; and further it was pretended with considerable proof of the truth of the pretension, that this $200 paid by Johnson to Cameron for Chamberlain, was Chamberlain's own money. The Respondent feels assured that the judgment of the Court below must be affirmed.

SANBORN & BROOKS,

Atty's for [illegible] *Respondent*

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